

**BRIEF IN SUPPORT OF THE FOREGOING PETITION.**

The facts with respect to the successive steps in the action are sufficiently set forth in the petition for the writ in support of which this brief is submitted, and need not be repeated here.

**Opinion.**

The Opinion of the Court of Claims of the United States (R. 14) is not reported.

**Jurisdiction.**

The final judgment of the Court of Claims of the United States was entered December 1, 1941. Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, 3(b) as amended by the Act of February 13, 1925.

**Statement.**

A brief resume of the facts, none of which are disputed, is as follows:

The plaintiff is a New York corporation, and for many years has operated a fully equipped coal yard on land adjacent to the artificial ship canal known as the Dyckman's Meadows cut-off, which formed a part of the project for the improvement of the Harlem River (R. 10, Sp. F. 3).

Coal was received by barge at the waterfront, and re-tailed from the yard to the customers by truck (R. 9, Sp. F. 2).

The waterfront line of the coal yard is the southerly boundary line of the strip of upland, 350 feet in width, taken in condemnation proceedings by the United States for the said Dyckman's Meadows cut-off (R. 10, Sp. F. 3). The taking was confined to the strip of land, and did not include rights or easements outside of the boundaries specified.

Within this strip of upland, a channel of 150 feet in width and 15 feet in depth was constructed, and since 1907 has been maintained for a varying width at a minimum depth of 15 feet, and a depth of 10 to 11 feet was provided at the bulkhead line along the coal yard, sufficient to accommodate the coal barges (R. 10, Sp. F. 3).

Following earlier dredgings, the Government dredged the waterway in the general vicinity of the Roden Coal Company's yard in 1926 and again in 1929 (R. 11, Sp. F. 4). There had been some settlement of the plaintiff's property following the dredging operations of 1926, but not of a serious nature. A settlement followed the dredging of 1929-30, which made necessary certain minor repair work (R. 12, Sp. F. 5), and plaintiff, under a permit of the government, also placed new steel sheet piling to a depth specified by the government, along the face of a section of the bulkhead, which encroached slightly beyond the boundary line of the plaintiff's property (R. 11, Sp. F. 4).

By the year 1937, it was apparent from previous experience that dredging close to plaintiff's bulkhead would place the coal yard in danger of subsidence through failure of the bulkhead to hold (R. 12, Sp. F. 5).

On November 1, 1937, the Government commenced dredging operations close to plaintiff's bulkhead. On that day, plaintiff's president, prior to the commencement of such dredging, communicated with the Government engineer, stating that he was fearful that the dredging would damage the Company's coal yard. On the morning of November 3, the Government engineer examined the site, found that cracks on plaintiff's land were opening up, and he removed the dredge from alongside the bulkhead where it had been operating to a position in midstream, and when it appeared later that settlement of the plaintiff's property

was continuing and the bulkhead was being forced channelward, the dredging operations in the vicinity were discontinued (R. 11, Sp. F. 4).

The dredging of November, 1937, did in fact cause a subsidence of plaintiff's coal yard and disintegration of the wooden portion of the bulkhead and cribbing back of the bulkhead to such an extent as materially to damage the coal yard and make useless a substantial part thereof. The bulkhead was of insufficient depth to withstand the dredging to the fifteen foot point and the consequent loss of material at its base, and the major part, with the land behind it, slid into the canal, leaving a substantial area of the coal yard permanently flooded and subject to erosion by the tides (R. 12, Sp. F. 6).

The fair market value of the plaintiff's coal yard before the loss and damage was \$204,809.00, and thereafter the value of the area remaining, less the area rendered useless by the permanent flooding was \$115,647.00, a decrease in fair market value of \$89,162.00 (R. 13, Sp. F. 8).

### **Errors Urged.**

The Court of Claims erred

(1) In refusing to award the just compensation for real property destroyed and damaged by the United States in the course of dredging operations which caused the permanent flooding of plaintiff's property.

(2) In holding that a permanent flooding of plaintiff's land caused by dredging in an adjoining artificial canal, a consequent subsidence and sliding into the canal of the plaintiff's land and structures, and the overflow of the waters of the canal, is not a taking.

(3) In holding that the United States acquired by condemnation rights of slope or overflow over adjoining lands and that the lands subsequently purchased by plaintiff were subject to such rights.

(4) In holding that the defendant had no liability because it had no intention to disturb the plaintiff's land or any reason to suppose such a result would follow.

(5) In holding that the defendant had no liability because its agents did not physically enter upon or occupy the plaintiff's land.

(6) In entering a judgment in favor of the defendant in the face of findings of fact which were ambiguous and contradictory.

(7) In entering a judgment in favor of the defendant on the assumption that plaintiff's property was subject to rights of the United States to maintain an artificial canal at the authorized depth and width, regardless of damage which might result, when there are no findings of fact to warrant such assumption.

(8) In entering judgment in favor of the defendant upon the theory that it was the plaintiff's responsibility to protect its property by maintaining bulkheads and foundations of sufficient strength and depth to prevent any damage in case of the excavation by the United States of the canal to its full authorized width and depth.

(9) In finding as a conclusion of law that the defendant was not liable upon findings of fact which were ambiguous, contradictory or silent as to facts relied upon as a basis for said conclusion.

## **ARGUMENT.**

### **Summary of Argument.**

- I. The extent of the constructive taking.
- II. The Government had no marginal rights.
- III. The slight encroachment of plaintiff's bulkhead beyond its property line did not affect its rights.

IV. The permanent destruction and flooding of a substantial part of the plaintiff's property by the duly authorized agents of the Government was clearly within the well established doctrine of constructive taking.

V. "Taking" extends to that which is destroyed and is not confined to that which is taken possession of and used.

VI. Plaintiff was under <sup>no</sup>~~an~~ obligation to protect its property against damage which might result from the acts of the Government in excavating the canal channel to its authorized depth of fifteen (15) feet.

VII. Findings of fact ambiguous, contradictory or silent.

VIII. Conclusion: Judgment should be reversed and case remanded for definite findings or on basis of facts already definitely found, judgment should be entered in favor of the plaintiff.

# I.

## The Extent of the Constructive Taking.

The undisputed facts clearly establish a case for the application of the principle of constructive taking.

The question is whether, in fairness to the owner, and in view of the fact that a substantial part of the coal yard has been rendered useless because of the washing away of the bulkhead and ground back of the bulkhead, and the overflow of the yard by the waters of the canal, the *entire* coal yard is to be considered as taken, or *only such part* of it as has been made subject to overflow.

If the entire yard is to be considered so damaged as to be unsuitable for continued use as a coal yard, in its present condition, then there has been a constructive taking of the whole, and under the law an implied promise arises to pay for the property an amount which will represent its

fair value immediately before the dredging. This has been found by the Commissioner to be \$204,809.00. (R. 13, Sp. F. 8.)

If, on the other hand, the taking is to be extended only to the portion of the property which has been made subject to overflow, then the recovery by the plaintiff will be limited to the difference in the value of the property before and after the taking. According to the finding of the commissioner, there has been a decrease in value of \$89,162.00. (R. 13, Sp. F. 8.)

There is a third possible treatment of the situation, namely, that the Government has taken only the slope rights necessary to permit of dredging up to the boundary line the full depth. As bearing upon this theory, there is a finding that to restore the use of the surface area of the coal yard as previously used, leaving slope rights for the waters of the canal underneath, the dock, with concrete slab, would cost \$45,044.00. (R. 12, Sp. F. 7.) To this amount it would be necessary to add the reasonable value of the easement of slope, to which the fee would be permanently subject. The criterion for recovery would still be the difference in value resulting from the acts of the Government—\$89,162.00, \$45,000.00 of which would go to construct the dock, which would make use of the restricted fee possible.

## II.

### **The Government Owned No Marginal Rights.**

We are not dealing with a natural navigable stream, but with an artificial canal constructed through private property consisting of upland, known at the time of the condemnation suit as Dyckman's Meadows. The canal strip was acquired by right of eminent domain. In the proceeding, no marginal lands and no slope rights were acquired; only the strip described by metes and bounds as shown on

the damage map. No rights in the abutting or adjoining properties ever passed into the ownership of the Government, and therefore, with respect to this artificial canal, it is in the position of a private owner of the fee and can claim no rights or privileges beyond the boundaries. The Government here has no paramount right as it may have in the case of a natural navigable stream, over the area outside of the canal lines, and can do nothing which will damage the adjoining lands without paying just compensation.

In the condemnation proceeding, the property acquired was limited to the strip specifically described in the petition, order of condemnation, commissioner's report, and final decree (Plf's Ex. 9, Sten. M. pp. 36, 37) and shown on the Damage Map (Plf's Ex. 10, Sten. M. pp. 37, 38).

The Damage Map has no indication of any marginal rights or easements being taken, but is confined to the numbered damage parcels described by metes and bounds in the papers above referred to.

For the convenience of the Court, the following excerpts from said exhibit are herewith given.

From the petition:

"Fol. 2. To the Supreme Court of the State of New York: The petition of the United States respectfully shows to this Court: That the United States desires to acquire certain real estate situate in the City and County of New York, and more particularly described in Schedule A hereto annexed as part of this petition in pursuance of an Act of Legislature of the State of New York, etc."

Schedule A set forth the detailed description of the property to be acquired. The westerly part of the southerly boundary of damage parcel 19' is the northerly boundary of plaintiff's land. The entire damage parcel took in a large area extending from the high water line of the Harlem

River on the east, back to Broadway on the west. It is referred to as follows:

"Fol. 13. Description of real estate referred to in the foregoing petition which the United States desires to acquire as stated in said petition, \* \* \*

Fol. 95 to Fol. 107. Parcel No. 19. All that certain piece or parcel of *land or land under water* bounded and described as follows: Beginning at a point on the line of high water in Harlem River at the intersection of said line with the southerly line of the proposed improvement; thence running along said line of improvement, etc. \* \* \* (Here follows *metes and bounds* description) containing sixteen and six hundred and ten one-thousandths (16 and 610/1000) acres. (Italics ours.)

Nowhere in the petition, either in connection with the description or in its general language is there any suggestion or indication that rights outside of the limits of the damage parcel are included in the taking.

The order entered on the 24th day of October, 1879, appoints the Commissioners:

"to ascertain and appraise the compensation to be made to said Isaac M. Dyckman and Fannie B. Dyckman, his wife, according to their several interests in said real estate, they being the owners or persons interested in *that parcel of real estate designated as Parcel No. Nineteen in the petition in the above entitled matter, and particularly described therein.*" (Italics ours.)

In this order there is no indication that any but rights or easements are to be acquired, nor in the report of the Commissioners, dated November 15, 1882, is there reference to any marginal rights. In the report, parcel 19 as described in the petition has been subdivided into 19<sup>1</sup> and 19<sup>2</sup>, 19<sup>1</sup> being the part directly adjacent to the plaintiff's property.



In the final decree, dated July 9, 1886, all of the proceedings from the beginning are recited,—the reports of the Commissioners are affirmed, both as to damages and assessments; the amounts awarded to each owner are stated with a full description of the property for which the awards are made. At Fol. 159 appears the award and description of Parcels 19<sup>1</sup> and 19<sup>2</sup>, the southerly boundary of 19<sup>1</sup> being identical with the northerly boundary of the plaintiff's property. There is no reference anywhere to marginal rights or easements outside of the southerly line of the damage parcel.

### III.

#### **As to Encroachment.**

The bulkhead, or dock, which had been built under permit and in accordance with the requirements of the Government as prescribed by the War Department, encroached slightly over the fixed southerly boundary line of the canal, which was the established bulkhead line. This was shown in the blue prints annexed to the permit issued by the Government. There is no dispute as to the fact that the construction conformed to the requirements specified in the permit.

If it be argued that, to the extent that the bulkhead encroached on Government lands, it was subject to removal, the answer is that, according to the terms of the permit, certain conditions were specified which were fully complied with by the owner, and the encroachment approved by the Government.

The Government makes no claim that it ever acted under the powers reserved to it by the permit to require the removal of the encroachment. On the contrary, it was shown that it later issued a permit for the rebuilding of the bulkhead at a location further beyond the line. At the time of the dredging, the bulkhead structure was, therefore,

legally and properly in place, and the destruction thereof, which accompanied the sliding of the land into the canal, is a part of the damage caused by the taking, and properly the subject of claim on the part of the owner.

#### IV.

#### **Constructive Taking.**

It is a well established principle in the law that one whose property has been injured or taken away from him by some tortious act may waive the tort and sue on contract for the value of the property taken. The Court of Claims, though having upon a particular state of facts, no jurisdiction to entertain an action sounding in tort, may under this principle entertain an action upon an implied promise by the Government to pay the value of the property taken and any consequential damage resulting from the taking. The Government is liable in the same manner as it would be if it had exercised its right of eminent domain and acquired the property by condemnation proceedings. In other words, the Court recognizes a constructive taking of the property and makes an award accordingly.

The above principle has been applied wherever there is a permanent flooding or destruction of property in the course of the Government's work of improving navigable waters. In a leading case (*U. S. v. Lynah*, 188 U. S. 445) Justice Brewer says:

“The government does not, in a sense, take this land for the purpose of putting its obstructions on it, but it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the government, that water in the river must be raised. The banks of this plantation materially assist

this operation, for by their assistance, the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking."

Mr. Justice Pitney, in a later case involving the overflow of lands (*U. S. v. Cress*, 243 U. S. 326) says:

"The authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like all others, must be exercised when private property is taken in subordination to the Fifth Amendment . . . where the government, by construction of a dam or other public works, so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment . . . Such of the properties . . . as were unaffected by the flows of the rivers and their tributaries prior to the construction of locks and dams in question were private property and not subject to be overflowed without compensation."

In the case at bar, property of the plaintiff was destroyed and its lands overflowed by the water of the canal as a result, not of the raising of the level of the waters of the canal, but of the lowering of the bottom of the canal to comply with the depth specified in the Act of Congress authorizing the work. In principle, the cases are the same. The dredging close to the plaintiff's property line caused his property to be undermined by the outward flow of the silt and mud of which the subsoil was largely composed, with the result that the bulkhead and dock collapsed and the land protected by the bulkhead sank to a point where a substantial part of it became submerged under the spreading waters of the canal. Such destruction of the plaintiff's property and the overflowing of his lands were clearly a taking.

## V.

**"Taking" in the Legal Sense Means Taking Away or Depriving a Party of a Thing.**

The word "taking" as used in relation to eminent domain, has long been recognized as embracing not only property acquired, for public use, but also property destroyed by the taking authority. It is immaterial whether the power which takes it away acquires the thing or whether it destroys it. In either case, it is equally a taking, and just compensation must be made.

The court, in its opinion, emphasizes the fact that, in the dredging operations the Government "did not in any way eneroach upon the property" or "exceed the authorized and legal dimensions of the waterway" (R. 17) and states: "From the foregoing, it is clear that the defendant did not in any way eneroach upon any property rights of plaintiff and under the facts disclosed, there is no justification for the application of the principle of a constructive taking" (R. 18).

This fallacious argument as to the scope of the word "take," namely, that it implies some actual physical encroachment or entry upon the property "taken" was advanced in a case where a corporation was given the right to construct a dam. Though the dam was constructed exactly in accordance with the statute, the water overflowed plaintiff's land. The statute made no provision for compensation in such contingency. But it was held that the injury to plaintiff's property was within the protection of the constitution—and Justice Miller says:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commenda-

tion of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." (*Pumpelly v. Green Bay Company*, 13 Wall. 166, at p. 177.)

The courts have with a high degree of uniformity recognized and applied the principles so strongly expressed by Justice Miller, as the following cases show :

*U. S. v. Grizzard*, 219 U. S. 180;

*U. S. v. Welch*, 217 U. S. 333;

*U. S. v. Great Falls Manufacturing Company*, 112 U. S. 645 p. 656;

*Hollister v. Benedict Manufacturing Co.*, 113 U. S. 59;

*U. S. v. Palmer*, 128 U. S. 262;

*Stephenson Brick Co. v. U. S.*, 110 F. 2d 360;

*Schufelbein v. U. S.*, 124 F. 2d 945;

*Tompkins v. U. S.*, 45 Ct. Cl. 66;

*U. S. v. Chicago, etc. R. R. Co.*, 113 F. 2d 219.

In *U. S. v. Grizzard* (219 U. S. 180) a narrow strip only, of a large farm was overflowed. The difference in the value of the farm before the overflow and after was allowed.

In *U. S. v. Walls* (44 Ct. Cl. 482) only 2 3/10 acres from

a large tract were overflowed and rendered useless, for which portion compensation was given.

In *Stephenson Brick Co. v. U. S.* (110 F. (2d) 360) where a small portion of a brick yard was overflowed, the court says:

“The owner is entitled to be compensated, not only for the separate value of the land taken, but also for the loss in value of the remainder of the tract in the use that was made of it at the time of the taking \* \* \* the fair value at the date of the taking, of the whole plant, excluding personal property ought to be ascertained, looking upon it as a plant organized for a business shown to be genuinely successful and having a good profit, and also the fair value of what was left afterward. The difference in value is the just compensation to be paid.”

In *Hood v. U. S.* (41 Ct. Cl. 30) only a one-half acre of plaintiff's seventy acres was overflowed. The court says:

“The permanent submerging of the quantity of land shown by the findings is such a taking as renders the Government liable.”

In *United States v. Chicago, etc. R. R. Co.* (113 F. (2d) 919, 925) the plaintiff's structures were located on the lands between high and low water lines, to which plaintiff held title, subject, of course, to the paramount right of the United States over navigable streams. As a result of work done in other parts of the river, the water was raised to a level above ordinary high water and it was held the Government had converted a navigable stream into an artificial canal to the extent of the raising of the water level, and that:

“The flooding of the appellees' property, here involved, above ordinary high water mark, was a taking of their property for which they are entitled to compensation.”

## VI.

**As to Obligation of Plaintiff to Protect Against Damage From the Dredging.**

The court concluded Special Finding of Fact No. 9 with what is obviously a conclusion of law, namely :

“The plaintiff’s damages were indirect and consequential due to its failure to maintain an adequate bulkhead and to its neglect to install sufficient foundations for its coal pockets, derrick, and other shore equipment” (R. 13).

This implies an obligation as a matter of law on the plaintiff’s part to protect his property against the effects of the dredging, and is obviously based upon the erroneous premise of fact assumed, without warrant, that the Government in acquiring title acquired marginal rights, subject to which the plaintiff acquired the property. In fact, in the opinion, it is stated:

“The plaintiff acquired the property subject to the undeniable rights of the United States to maintain a navigable waterway at the authorized depth and width.”

and again

“When plaintiff acquired the property, it acquired it subject to the existing rights of the United States, and plaintiff did not acquire any right to prevent the United States from properly maintaining the navigable waterway or to compel it to answer for any damage that might result from collapse of the bulkhead by reason of proper maintenance of the waterway by the defendant” (R. 18).

There are no facts in the findings or in the record anywhere which support the above statements that any rights in or over the Roden Coal Company property existed in

favor of the United States, to which the property was subject from the time of the condemnation of the adjoining strip in 1886 down to the present date.

Yet unless the facts show that such rights existed, the decision arrived at cannot be upheld, for it is unequivocally based upon the theory that the property damaged was subject to said rights and that therefore, if in the exercise of such rights, damage resulted to the property, it was indirect and consequential to the exercise by the defendant of a lawful power.

It is clear beyond question that, unless the plaintiff *did* acquire the property subject to the rights which the Court assumed existed in favor of the United States, then there was no obligation on its part to protect against damage which might result from the dredging. It was in the position of an owner of the full fee and as such enjoyed the rights attached to such ownership.

When the United States, to complete the work provided to be done by Congress, dredged the channel for the canal in front of the plaintiff's land, thereby causing the plaintiff's dock structure, coal pockets, etc., to collapse and the plaintiff's land to slide into the canal excavation and the waters of the canal to overflow same, it was not exercising any paramount right over a navigable stream to improve navigation.

It was acting deliberately to dredge to the required depth a canal directed to be constructed by an Act of Congress. It knew, or at least is chargeable with knowledge, because of previous experience, that the soil was of such a character that it would not support itself alongside a vertical cut of the depth required, and that it must be artificially supported to prevent damage—a burden the expense of which it could not shift on to the shoulders of the adjoining owner. In this respect the United States stood in a position no



different from a private owner. The old common law rule has been expressed as follows:

“I have a natural right to the use of my land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots, and the owners of these lots will not be permitted to destroy my land by removing this natural support or barrier.” (Riley v. Continuous Rail Joint Co., 110 Appellate Division 787, 789.)

This principle has been generally embodied in the statute law. In New York State it is expressed in Chapter 929 of the 1937 laws of New York (known as the Administrative Code).

Article 9, Sub-article 2, Section C. 26-384.0.

“Excavations affecting adjoining property.—a—Temporary support of adjoining property. Any person causing any excavation to be made shall provide such sheet piling and bracing as may be necessary to prevent the earth of adjoining property from caving in before permanent supports have been provided for the sides of such excavation. b—Permanent support of adjoining property.—Whenever provisions are lacking for the permanent support of the sides of an excavation in accordance with the provisions of Section C26-563.0, a person causing such excavation to be made shall build a retaining wall at his own expense and on his own land. Such retaining wall shall be carried to a height sufficient to retain the adjoining earth, shall be properly coped and shall be provided with a substantial guard rail or fence four feet high.

C26-385.0. Excavations affecting adjoining structures.—a—Excavations more than ten feet deep.—Whenever an excavation is carried to a depth of more than ten feet below the curb, the person who causes such excavation to be made shall, if afforded the license necessary to enter the adjoining premises, at all times and at his own expense preserve and protect from in-

jury any structure the safety of which may be affected by such part of the excavation as extends more than ten feet below the curb, and such person shall support the adjoining structure by proper foundations, whether or not such structure is more than ten feet below the curb."

It is to be noted that the dredging which caused the damage was below the 10 foot depth. No question can be raised as to the responsibility being limited to the land as distinguished from the structures. Unless by some legerdemain the United States acquired a right to override the ordinary principles of private ownership as to which we find no evidence, it was responsible for the ordinary and natural consequences of its acts in the use of the land acquired by condemnation.

It had no more right to excavate the land to the damage of adjoining lands than a private owner. In fact, for the purpose of the use of the strip acquired, it *was* a private owner.

*People ex rel. Western N. Y., etc., R. R. Co. v. State Tax Commissioner*, 244 N. Y. 596, 597;  
*Morgan v. King*, 35 N. Y. 453, 457.

The unfortunate mistake made by the Court in proceeding upon the theory that marginal rights were acquired by the United States with the title, and that, accordingly, the plaintiff must have owned the land subject to such existing rights, makes it imperative, if justice is to be done, that said mistake be corrected. If the Special Findings of Fact are silent or are ambiguous as to this point, then justice requires that the case be remanded for definite finding. If, however, as we claim, there is no warrant in the facts found or in the record anywhere for the mistaken conclusion, then the judgment should be ~~revised~~ and judgment directed for the plaintiff. *reversed*

## VII.

**Findings of Fact Ambiguous and Contradictory.**

Certain facts were assumed by the Court as true and were directly referred to as grounds for its conclusion of law, although the Findings of Fact with respect thereto were ambiguous and contradictory.

These facts were:

(a) That the defendant had no reason to expect the damage would follow the dredging (R. 13, F. 9).

(b) That the defendant did not use, occupy, invade, or encroach upon plaintiff's land (R. 13, F. 9).

(a) is definitely contradicted by Finding 5, which finds: "By the year 1937, it was apparent that dredging close to plaintiff's bulkhead would place the coal yard in danger of subsidence through failure of the bulkhead piling to hold."

(b) is inconsistent with the definite statement in Finding 6 that "the dredging did in fact cause a subsidence of plaintiff's coal yard and disintegration of the wooden portion of the bulkhead and cribbing back of the bulkhead to such an extent as materially to damage the coal yard and make useless a substantial part thereof. \* \* \* exposing a portion of the coal yard to flooding and erosion of high tides."

The words "invade" and "encroach" do not imply physical entry by the defendant and its agents, but are broad enough to include acts which result in destruction of and damage to property which have uniformly been recognized as amounting to a taking, in the cases cited in the earlier part of this brief.

The contradictory and ambiguous findings above referred to, coupled with the absence of definite findings as to the existence of marginal rights in favor of the United

States (see petition, p. 7 and II and VI, *ante*) did not warrant the assumption by the Court of the facts upon which it rested its conclusion of law.

The judgment should be reversed and the case remanded for definite findings.

*Luckenbach v. U. S.*, 272 U. S. 533, 539;

*U. S. v. Adams*, 6 Wall. 101, 111-112;

*U. S. v. Clarke*, 96 U. S. 37, 39.

### VIII.

#### Conclusion.

The Roden Coal Company, an active successful business concern, has been suddenly put out of business and brought to the verge of financial ruin.

The disaster results directly from the acts of the Government in proceeding with the dredging of an artificial waterway close to the line of the Coal Company's land.

The dredging was proceeded with on November 1, 1937, after an express warning by the Coal Company's president to the United States engineer in charge, that damage would follow. Experience with prior dredgings also had made it "apparent that dredging close to plaintiff's bulkhead would place the coal yard in danger of subsidence through failure of the bulkhead piling to hold."

The engineer in charge on the morning of November 3 discovered signs of subsidence and moved the dredge away from the bulkhead out into the stream, but it was too late. Subsidence of the land continued, disintegration of the bulkhead proceeded; the land and bulkhead slid down into the waterway "exposing a portion of the coal yard to flooding and erosion of high tides"; destruction occurred to "such an extent as materially to damage the coal yard and make useless a substantial part thereof."

The United States neither had nor ever claimed any slope rights or other rights over the Coal Company's land.

In this suit, the Attorney General set up no such defense. The Special Findings of Fact contain no finding as to such rights. The Court of Claims, however, proceeded as though such rights existed, and the opinion states that the United States obtained title from the owners "including any rights adjacent to the actual dimensions of the navigable channel that might be affected by construction of the navigable waterway."

If there be doubt as to whether such rights were acquired, the petitioner asks that the case be remanded for a definite finding on this point. If, however, upon the findings as made, this Court is satisfied that no such rights were acquired, then upon review the judgment should be reversed, since only upon the ground of the existence of such rights can the judgment be justified.

If the Court shall decide to remand the case for a definite finding as to the said rights, in so far as the findings, which have been hereinabove noted as contradictory, may be deemed to have contributed to the erroneous conclusion reached, they should be corrected.

Respectfully submitted,

JOHN JAY MCKELVEY,  
*Attorney and Counsel for*  
*Petitioner Roden Coal Company.*

Dated May 12, 1942.

